No. 02-0427

IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

WEST ORANGE-COVE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, ET AL.,
Petitioners,

v.

FELIPE ALANIS, In His Official Capacity as the Commissioner of Education, ET AL.,
Respondents.

On Appeal from the
Third Court of Appeals, Austin, Texas

RESPONDENTS' BRIEF ON THE MERITS

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RESPONDENTS' BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

COME NOW Respondents FELIPE ALANIS, Texas Commissioner of Education, TEXAS EDUCATION AGENCY, CAROLE KEETON RYLANDER, Texas Comptroller of Public Accounts, and TEXAS STATE BOARD OF EDUCATION, and file this their Brief on the Merits, and would respectfully show the Court the following:

I.

STATEMENT OF THE CASE

Respondents add the following clarifications to Petitioners' statement of the case:

Disposition in the trial court: Petitioners correctly recite that the trial court dismissed on special exceptions Petitioners' claim that the $1.50 cap on local maintenance and operation taxes has resulted in a state ad valorem tax in violation of article VIII, § 1-e of the Texas Constitution. The court recognized that Petitioners had failed to plead that they were at the cap *because they must be* to provide an accredited education (*i.e.*, a general diffusion of knowledge), but the court assumed, for pleading purposes, that a district that is at the cap *must be* at the cap in order to provide an accredited education. The court then found that, for the cap to create a *state* ad valorem tax, Petitioners were required to plead that a "constitutionally significant number" of districts must be at that cap. The court found that Petitioners did not and could not meet this pleading threshold**.** The court understood from the hearing on special exceptions that Petitioners had pled their best case and wished to stand on their amended pleadings. The court went on to dismiss Petitioners' alternative claim that the $1.50 cap *will in the future result* in a state ad valorem tax on the jurisdictional ground that such claim is not ripe.

Disposition in court of appeals: The court of appeals affirmed the trial court's dismissal, but in doing so concluded that the trial court's assumption that a school district that is at the cap *must be* at the cap in order to provide an accredited education was unnecessary because the record demonstrated that Petitioners did not and could not plead they were required to tax at the cap in order to provide an accredited education. Instead, Petitioners pled that they were forced to tax at $1.50 to "educate [their] students." The court of appeals found that Petitioners wished to

stand on their amended pleadings. The appellate court determined that Petitioners' pleadings failed to state a cause of action and affirmed the dismissal on the pleadings. The court went on to alternatively conclude that, because Petitioners did not and could not plead that they were required to tax at the cap in order to provide an accredited education, their claims were not ripe for adjudication.

II.

STATEMENT OF JURISDICTION

The petition for review does not provide a basis for this Court to exercise its jurisdiction under Texas Goverment Code § 22.001(a)(6). Although public school finance is an important issue for the State, the constitutionality of this system is not presented by this appeal. All that is before this Court is Petitioners' failure to state a claim that could survive special exceptions and a plea to the jurisdiction. The petition simply presents unremarkable issues related to pleading requirements and special exceptions practice which are unworthy of this Court's review. The court of appeals determined that the district court correctly found that Petitioners wished to stand on their amended pleadings. The court of appeals affirmed the district court's dismissal of Petitioners' suit on special exceptions for failure to state a claim and on a plea to the jurisdiction on ripeness grounds. These rulings do not present issues of such importance to the jurisprudence of the State that they require this Court to exercise jurisdiction.

Indeed, the last time this Court addressed the State's school finance system, it not only confirmed the constitutionality of the current school finance system, it expressly resolved the specific constitutional issues that Petitioners attempt to litigate in this case. *See Edgewood I.S.D. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (*Edgewood IV*). The court of appeals held that Petitioners' claim was properly dismissed because Petitioners did not and could not plead that they were required to tax at the $1.50 cap in order to provide an accredited education,

which, in accordance with *Edgewood IV*, the court equated with the constitutional requirement to provide a "general diffusion of knowledge." Petitioners now contend that they should be permitted to litigate the question whether the provision of an accredited education meets the constitutional requirement of providing a general diffusion of knowledge.[1] But as the trial court and the court of appeals both recognized, this Court expressly answered that question in *Edgewood IV*. This case thus presents no unresolved issues of significance to the State's jurisprudence.

III.

ISSUES PRESENTED

Respondents disagree with Petitioners' characterization of the issues presented in this case. Under Texas Rules of Appellate Procedure 53.3(c)(1), Respondents state the issues presented as follows:

> This Court has previously upheld the constitutionality of the State's current school finance system. In doing so, the Court suggested that, if the cost of providing a general diffusion of knowledge (the floor) increased to the point that districts were required to set their local ad valorem maintenance and operations taxes at the statutory cap of $1.50 (the ceiling), then the districts would have no meaningful discretion and the tax would in effect become an unconstitutional state ad valorem tax. To reach that point, however, the districts must show not only that they have set their tax rate at the statutory cap, but that they were required to do so simply to provide a general diffusion of knowledge. Moreover, the Court has expressly recognized that

[1] Petitioners did not plead in their Second Amended Petition that the current accreditation standards do not satisfy the constitutional standard of a general diffusion of knowledge, but they now raise this issue for the first time in their Petition for Review.

the legislature, within its constitutional authority, is responsible for setting the measure for a general diffusion of knowledge by setting standards for an accredited education. In light of this:

1. Because Petitioners did not and could not in good faith plead that they must tax at the cap in order to provide an accredited education, did the court of appeals properly uphold the dismissal on special exceptions of Petitioners' claim that the tax has become a state ad valorem tax?

2. Because Petitioners did not and could not in good faith plead that they must tax at the cap in order to provide an accredited education, did the court of appeals properly uphold the dismissal for lack of ripeness of Petitioners' claim that the tax has become a state ad valorem tax?

Additionally, Respondents Reply to Petitioners' Issue 2 as follows:

> The district court reasonably assumed that the system for public school finance could not violate article VIII, § 1-e of the Texas Constitution unless the $1.50 cap had created a statewide problem, and the bright-line pleading test set by the district court to determine if the petitioners could challenge the constitutionality of provisions of the Education Code was reasonable.

IV.

STATEMENT OF FACTS

The opinion of the court of appeals correctly states the facts. Respondents disagree, in part, with paragraphs C and D of Petitioners' Statement of Facts, and offer the following corrections[2]:

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[2] Petitioners' brief quotes from several hearsay sources and contains many misstatements of fact. Respondents have not used their briefing space to challenge each of these statements. However, a few examples should serve to illustrate the problem. On page 26, Petitioners cite Benavides I.S.D. as a district (continued...)

A. Respondents' Special Exceptions and Plea to the Jurisdiction Put Petitioners on Notice That to State a Claim of Changed Circumstances They Must Plead That They Are at the $1.50 Cap and That They Are Forced to Be There to Meet Accreditation Standards.

On May 7, 2001, Respondents filed a special exception "to Plaintiffs' entire petition because it fails to allege facts that would confer jurisdiction" on the district court. In the same document, Respondents urged their Plea to the Jurisdiction arguing, *inter alia*, that Petitioners' claims were not ripe because they "do not allege that the system requires them or any other district to tax at the rate of $1.50 *in order to provide a general diffusion of knowledge* . . . that is, just to provide an *accredited education*." (*See* Clerk's Record at 0011[3]).

On June 11, 2001, Petitioners amended their petition but did not cure this deficiency. Instead, Petitioners pled that school districts "are required to tax at or near the maximum allowable rate . . . *to educate* students in their districts." (Emphasis added). They also responded to Respondents' plea to the jurisdiction and special exception but, as to the latter, elected to stand on their pleadings. (C. R. 112.)

On June 18, 2001, Intervenor Alvarado filed a special exception asserting that Petitioners did "not plead all the elements necessary to support th[eir] cause of action

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[2] (...continued)
suffering from the effects of the $1.50 cap without noting that in FY2001 the district had a serious deficit fund balance because it had too many staff (127 employees for 538 students) and non-existent financial controls. In one example of waste, a local restaurant had tapped into the district's waterline and was receiving free water service. The $1.50 cap did not cause this district's problems. On page 27 of their brief, Petitioners list Brazoria County I.S.D., but there is no such district.

[3] Hereinafter "C. R. ___."

because Petitioners omitted that they were required to adopt a $1.50 tax rate in order to provide the constitutionally-required general diffusion of knowledge to their students."

On June 27, 2001, Petitioners responded to Alvarado's special exception. Again, they did not amend their pleading but instead argued that, by quoting cautionary language from *Edgewood IV*, they had implicitly pleaded that they had to tax at or near $1.50 just to provide their students with a general diffusion of knowledge. (C. R. 202.)

B. At the Hearing, Petitioner Resisted Pleading That They Must Tax at the Cap (the Ceiling) to Meet Accreditation Standards (the Floor) and Elected to Stand on Their Pleadings.

At the June 28, 2001 hearing on special exceptions and the plea to the jurisdiction, Petitioners' attorney resisted equating "a general diffusion of knowledge" with an accredited education, *see* Reporter's Record[4] at 45-51, and again elected to stand on their pleadings:

> THE COURT: Well, let me ask counsel for the plaintiffs, are you are you are you pleading that the you can't provide an accredited system on $1.50 or are you pleading that the accredited system isn't good enough to provide a general diffusion of knowledge and you can't provide a general diffusion of knowledge on $1.50?
>
> MR. BRAMBLETT: All of the above. . . . We pled it. It's pretty clear what we're driving at. We're driving at Page 738 of the Edgewood majority opinion.
>
> . . . .
>
> THE COURT: Well, so what about Mr. Woods'[5] special exception? Are you prepared to say what it costs to provide a general diffusion of knowledge?

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[4] Hereinafter "R. R. __."

[5] Mr. Woods is the attorney for the Alvarado Intervenors.

> MR. BRAMBLETT: I think that it's unnecessary for the Court to grant that motion for special exception. . . . We have met our pleading obligation.

Id. at 93, 97-98.

C. The Court of Appeals Found That Petitioners Either Could Not or Did Not Seek to Further Amend Their Pleadings.

The Court of Appeals found that "West Orange-Cove either could not or did not seek to amend its pleadings." *West-Orange Cove Consol. I.S.D. v. Alanis*, 78 S.W.3d 529, 538 (Tex. App Austin, 2002, pet. filed). *See* Tab A at 13. The Court of Appeals did not hold, as Petitioners assert, "that a claim could be stated if even a single district is forced to tax at the cap." (Pet. for Rev. at 1)[6].

D. Though the Public School Finance System Has Been Modified by the Legislature Several Times Since Edgewood IV, the Current System is Essentially the One Approved by This Court, and Each Modification by the Legislature Has Balanced the Concerns of Property-Wealthy Districts Against the Needs of Property-Poor Districts.

The legislature has modified the public school finance system several times since 1995, but, as Petitioners concede, the system is basically the one that this Court found to be constitutional in *Edgewood IV*. When the Education Code was recodified, Chapter 16 became Chapter 42 and Chapter 36 became Chapter 41. The legislature increased the basic allotment from $2300 to $2387 in 1995, to $2396 in 1997, and to $2537 in 1999. And the legislature increased the guaranteed yield from $20.55 to $21 in 1995, and to $24.70 in 1999. The 77th

[6] The Court of Appeals's analysis could as easily lead to the holding that even if every school district in Texas were taxing at $1.50, their claims would be unripe unless they were able to plead that they were forced to tax at the maximum allowable rate just to provide an accredited education.

Legislature raised the yield to $25.81 in 2001-02 and to $27.14 for 2002-03. *West-Orange Cove Consol. I.S.D. v. Alanis*, Modified Final Order, 345th Dist. Ct., Travis Cty. (No. GV1-00528).[7] *See* Tab B at 27.

In 1995, the legislature authorized a $170 million Facilities Assistance Grant program to provide aid to 276 districts through a formula based on size and wealth, which supported the construction of approximately $250 million in facilities. In 1997, the Legislature authorized $200 million for a guaranteed-yield program known as the Instructional Facilities Allotment (IFA). This program provided guaranteed state aid for debt service over a period of eight years or more based on a formula that considers property wealth per student, the issuance of eligible debt, and tax effort. State aid is provided in the form of yearly support to help districts pay long-term debt service costs rather than one-time cash awards. In 1999, the Legislature continued the IFA and guaranteed districts $35 per student in average daily attendance (ADA) per penny of tax effort for new instructional facility debt obligations. While the IFA is a guaranteed yield program, districts must apply to participate. District property wealth is the central factor in determining acceptance of a district. The IFA is a sum certain appropriation. In 1999, the Legislature also created the Existing Debt Allotment (EDA), guaranteeing $35 per penny per ADA for up to $0.12 of tax effort (more if funding is available) for old debt. Tier 2 funds can no longer be used for debt service or capital outlay. The 77th Legislature extended the guarantee up to $0.29 of tax effort and broadened the

[7] Hereinafter cited to as "Tab B."

definition of eligible bonds. Tab B at 27-28.

Overall, the public school system is driven by the tax rates set by local school districts. One of the flaws of previous systems was that they "subsidiz[ed] wealthier school districts at the expense of property poor districts." *See Edgewood I.S.D. v. Kirby*, 804 S.W.2d 491, 496 n.12 (Tex. 1991) (*Edgewood II*). In Tier 2, the guaranteed-yield tier, the Legislature equalizes a school district's maintenance and operations (M&O) tax effort up to $1.50. The current system generally prohibits school districts from imposing a M&O tax at a rate that exceeds $1.50 per $100 in property valuation.[8] *See* TEX. EDUC. CODE § 45.003(d). This cap on tax rates limits the amount of unequalized dollars in the system.

In 1997, the legislature raised the equalized wealth level (the limitation on the tax base available to property-wealthy districts) to $295,000 per weighted student in average daily attendance (WADA), and made the hold-harmless provision for certain wealthy districts (as described in *Edgewood IV*) permanent and indexed to changes in the equalized wealth level. The 77th Legislature raised the equalized wealth level to $300,000 per WADA in 2001-02, and to $305,000 in 2002-03. TEX. EDUC. CODE ANN. § 41.002 (Vernon Supp. 2002). This limitation on the amount of wealth available to a school district was characterized by this Court as the cornerstone of the efficient system approved in *Edgewood IV* because "with the cap in place, the resources in the wealthiest districts are burdened to substantially the same extent as are the remainder of the State's resources." *Edgewood IV*, 917 S.W.2d at 735.

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[8] The $1.50 cap does not apply to a school district's tax rate for debt (Interest and Sinking Fund, or I&S, tax rate). *See* TEX. EDUC. CODE §§ 45.001, .003.

The *Edgewood* litigation has established that the VII, § 1 requirement of an "efficient system of public free schools" is only met when "districts . . . have substantially equal access to funding up to the legislatively defined level that achieve the constitutional mandate of a general diffusion of knowledge." *Id.* at 730. Each time the Legislature has modified the financing system it has balanced the effects of its modifications between property-poor and property-wealthy districts to preserve the efficiency of the system. The goal has been to ensure that all students in Texas, regardless of where they live, will have substantially equal access to a quality education. *Id*. at 729.

V.

SUMMARY OF THE ARGUMENT

This is an appeal about the propriety of granting special exceptions and, alternatively, granting a plea to the jurisdiction. The petition for review does not raise unsettled questions of constitutional law. Indeed, the district court dismissed Petitioners' lawsuit on the pleadings, and the court of appeals affirmed, applying the standards that this Court articulated in *Edgewood IV*. The core issue raised by Petitioners' pleadings is whether they have lost meaningful discretion in setting their local ad valorem tax rate. By pleading that school districts are at or near the cap " to educate their students," Petitioners do not allege, in a constitutional sense, that they have lost meaningful discretion in setting their tax rate.

Recognizing that they cannot in good faith plead a loss of discretion in setting their tax rate, Petitioners instead ask the Court to revisit its determination that the constitutional

standard of a "general diffusion of knowledge" is equivalent to an accredited education. They ask this despite not having pled this at the district-court level. Petitioners also reject the idea that the relief they seek is that the Legislature raise the $1.50 cap. Petitioners disclaim this remedy because what they really seek is relief from the equalization provisions of the school finance system.

It is clear from Petitioners' petition that they did not state a claim of changed circumstances from the time *Edgewood IV* was decided, warranting a review of the local ad valorem school tax as a violation of article VIII, § 1-e of the Texas Constitution. It is also clear from the procedural facts that Petitioners had the opportunity to replead but choose to stand on their amended pleadings.

Petitioners' desire to exceed the $1.50 cap on maintenance and operations taxes to fund their desired program of education does not state a claim for relief unless they can allege that they must tax at the cap just to provide an accredited education.[9] By asking this Court to revisit what constitutes a "general diffusion of knowledge" and reject accreditation as the standard, Petitioners are asking this Court to reverse its holding that, "the accountability regime set forth in Chapter [39] [the standards for an accredited education] meets the Legislature's constitutional obligation to provide for a general diffusion of knowledge statewide " *Id.* At 730. The Court in *Edgewood* correctly recognized that the Legislature has

[9] Equity questions finally settled by *Edgewood IV* would be implicated by the Court's endorsement of Petitioners' desire to have their cost of education transformed into the constitutional standard of a "general diffusion of knowledge." The cost implications for the State would be great. It is properly within the duty of the Legislature to determine the burden taxpayers can bear and the types of taxes to be utilized.

"broad discretion to make the myriad policy decisions concerning education." *Id.*

Additionally, Petitioners have failed to plead a claim that is ripe because of their failure to allege that they must be at the cap to provide an accredited education. Alternatively, under the district court's analysis, the issue is whether the $1.50 cap has resulted in a statewide unconstitutional tax. This approach is reasonable under *Edgewood* law. The determination that a constitutionally significant number of districts must be at the cap before a statewide problem could possibly exist is reasonable. Petitioners fail to state a claim because they have not met the district court's bright-line test: pleading that a constitutionally significant number of districts are at the cap. Further, without meeting this pleading standard, they fail to state a ripe claim.

VI.

ARGUMENT AND AUTHORITIES

A. Petitioners Should Be Required to Plead Constitutionally Significant "Changed Circumstances" to Attack the Public School Finance System That This Court Has Found Constitutional.

Whenever a party challenges the constitutionality of a state statute, a court must presume that the statutory provisions under attack are constitutional and place the burden to prove otherwise on the party bringing the challenge. *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 558 (Tex. 1985). No stronger presumption exists than the presumption favoring the validity of a statute. *Vernon v. State*, 406 S.W.2d 236, 242 (Tex. Civ. App. Corpus Christi 1966, writ ref'd n.r.e.). The Court should presume that the Legislature "understands

and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds." *Lucas v. United States*, 757 S.W.2d 687, 694 (Tex. 1988).

Not only does the general presumption of constitutionality operate in this case, but this Court has already explicitly held that the provisions challenged in this case are constitutional. In 1995, this Court in *Edgewood IV* specifically held that, although the system requires a minimum rate of $0.86 to participate in the Foundation Program and sets a maximum rate of $1.50 for local ad valorem M&O taxes, it does not deprive the districts of meaningful discretion and therefore does not transform the local ad valorem tax into an unconstitutional *state* ad valorem tax. *Edgewood IV,* 917 S.W.2d at 756. The Court applied its prior holding that

> [a]n ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion.

Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 502 (Tex. 1992) (*Edgewood III*).

The Court cautioned, however, that the tax could become a state ad valorem tax if future economic changes effectively required districts to tax at the $1.50 statutory cap (the ceiling) in order to provide the constitutionally required general diffusion of knowledge (the floor):

> If the cost of *providing for a general diffusion of* knowledge continues to rise, as it surely will, the minimum rate at which a district *must tax* will also rise. Eventually, *some* districts may be forced to tax at the maximum allowable rate *just to provide a general diffusion of knowledge*. If a cap on tax rates were to become in effect a *floor as well as a ceiling*, the conclusion that the Legislature had set a *statewide* ad valorem tax would appear to be unavoidable because the districts would then have *lost all meaningful discretion* in setting the tax rate.

Edgewood IV, 917 S.W.2d at 738 (emphases added).

To properly understand this language, it is necessary to recognize, as the trial court and the court of appeals did, that both this Court and the Legislature have already determined that the constitutional requirement of a "general diffusion of knowledge" is measured and met by legislatively determined accreditation standards. *See id*. at 730 (noting that the "Legislature equates the provision of a 'general diffusion of knowledge' with the provision of an accredited education"); *id*. at 731 n.10 ("accreditation standards [are] the legislatively defined level of efficiency that achieves a general diffusion of knowledge"). It is the role of the Legislature, and not the courts, to make the policy choices regarding the type of education that is necessary to provide a "general diffusion of knowledge." *See id*. at 726 (discussing the respective roles of the legislature and the courts).

Thus, to use the *Edgewood IV* Court's cautionary language as the door to another wave of school finance litigation, Petitioners must plead and prove not simply that they have set their taxes *near* the $1.50 cap, nor even that they have set their taxes *at* the $1.50 cap. Instead, they must plead and prove that the system effectively requires them (or, as the district

court found requires a "constitutionally significant number of districts") to set their rates at the $1.50 cap *in order to provide an accredited education.*

Petitioners did not plead this. Instead they pled that "school districts, such as the [Petitioners], are required to tax at or near the maximum allowable $1.50 M & O tax rate in order *to educate* students in their districts." (Emphasis added.) The Third Court correctly held that "this allegation does not refer to the districts' state-imposed obligation to provide an accredited education; as such, the districts' pleadings fail to state a challenge to the tax as a state tax." Merely being at or near $1.50 does not entitle a district to judicial intervention. Under this Court's warning, the tax only raises a constitutional question if the floor, a general diffusion of knowledge, can only be met by taxing at the ceiling.[10]

Petitioners ask this Court to reverse the appellate court and remand this case. However, they do not want the opportunity to re-plead to assert that they must set their rates at $1.50 to provide an accredited education. Instead, they ask this Court to remand after reconsidering and striking down the clear standard it previously set for a general diffusion of knowledge: the constitutional requirement that the State provide an efficient system for the general diffusion of knowledge "means that each district must have substantially equal access to the funds necessary *to provide an accredited education*." *Edgewood IV*, 917 S.W.2d at 730

[10] As the district court observed, "an educator would want the space between the floor and the ceiling to be as close as possible because that space represents available but unspent money. Educationally, a small gap is a good thing, not a bad thing." Tab B at 21.

n.9 (emphasis added).[11]

At the district court, Petitioners prayed

> that the Court enter a judgment declaring that the $1.50 statutory cap on M & O tax rates constitutes an unconstitutional statewide ad valorem tax. This constitutional deficiency cannot be cured simply by raising the statutory cap, because such a solution would only aggravate the State's overreliance on local property taxes as a means of financing the school system. Rather, Plaintiffs request that the State assume a greater responsibility for financing the school system and end its overreliance on the local property tax.

Petitioners argue to this Court that they have lost meaningful discretion in setting their tax rates because of "state-imposed constraints." Pet. Brief at 5. But the "state-imposed constraints" they reference cannot be the accreditation standards, because they want to exceed them, or the $1.50 cap, because they do not want to tax higher, and can only be the equalization provisions of Chapter 41 of the Education Code.

Unfolding Petitioners' pleadings makes it clear that Petitioners are inviting this Court to reverse several settled principles of constitutional law. Petitioners are asking the Court to agree that:

> the cap, even though it has not become the floor, creates a state ad valorem tax;

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[11] Petitioners argue, on the one hand, that accreditation standards are too low and, on the other hand, that they need more money to prepare their students for the more rigorous accountability system that is being phased in beginning in 2003. *Compare* Pet. Brief at 18 and n. 20, *with* Pet. Brief at 21-24. On page 24 of their brief, Petitioners attempt to bolster their argument that the accreditation standards are not high by citing to a policy review prepared for TEA by Achieve, Inc. in June of 2002. However, this report compliments Texas for being a leading state in the national effort to raise academic standards. As the report explained ". . . greater numbers of Texas children are learning more now than ever before." ACHIEVE, INC., AIMING HIGHER; MEETING THE CHALLENGES OF EDUCATION REFORM IN TEXAS 9 (June 2002), available at http://www.tea.state.tx.us/curriculum/aimhitexas.pdf.

a school district's actual costs create the constitutional standard for the cost of a general diffusion of knowledge;

the Texas Constitution requires the State to pay the majority of the total cost of education;

it is the role of the Court to determine, in the first instance, what constitutes a general diffusion of knowledge;

the State cannot delegate state functions to a political subdivision without paying the cost of carrying out those functions;

the Court should make tax policy;

the Legislature can authorize political subdivisions to tax but cannot impose limits on that authority;

a tax levied by one school district could be an unconstitutional state ad valorem tax while the same tax in another district remains constitutional;

the Court can strike down the cap without declaring the tax unconstitutional;

it is constitutionally acceptable for portions of the available property tax base to be unavailable to the system; and

it is constitutionally acceptable, with the cap struck down, for property-rich districts to have access to much greater revenue than property-poor districts at the same tax rate.

The Third Court determined that the record made it clear that "West-Orange Cove wants to use this opportunity, framed as a tax challenge, to engage the judiciary in a debate over policy choices that are within the province of the legislative branch." *West Orange-Cove*, 78 S.W.3d at 540; Tab A. The arguments that Petitioners make before this Court

confirm that they are asking the judiciary to take over the role that our system assigns to the Legislature.

Petitioners face no risk of failing to provide an accredited education; they are limited only in the type of education that *they want to provide* because of the $1.50 cap. While this creates budget choices for the districts and policy choices for the Legislature, it does not state a claim of changed circumstances to reopen the *Edgewood* litigation.

B. Petitioners Have Not and Cannot Assert a Constitutional Claim Under the Facts of This Case to Avoid Dismissal After Special Exceptions or to Avoid Dismissal for a Lack of Ripeness.

1. Petitioners were not denied the opportunity to plead their case.

Petitioners had ample opportunity to plead a viable cause of action. What they lack is a factual basis to do so in good faith. Alvarado's special exception clearly implied the *Edgewood IV* definition of a "general diffusion of knowledge," and was filed ten days before the hearing at which Petitioners decided to stand on their pleadings. State Respondents' special exception filed in May of 2001 stated that Petitioners failed to plead facts that would confer jurisdiction on the district court, and it was accompanied by a plea to the jurisdiction clearly arguing that Petitioners were required to plead that they were forced to tax at the cap just to provide an accredited education. (C.R. 0011.) Petitioners repled in response to the State's exception and plea and filed a response before the hearing to Alvarado's exception, but they did not meet the necessary pleading threshold, because they could not. (C.R. 112.)

In their response filed in the district court on June 11, 2001, Petitioners, rather than articulate facts which would state a claim, argued that:

> Defendants' argument that some Plaintiff districts are taxing at $1.45 instead of $1.50 or are expending more funds per student than the average Texas accredited school is beside the point.
> . . . .
>
> Low student-to-teacher ratios, broad and diverse academic offerings, and extracurricular activities are the hallmarks of high-quality schools in Texas.
>
> These high quality schools are endangered now as a result of the $1.50 cap. . . . The $1.50 cap could therefore seriously diminish the number of "exemplary" schools in Texas and level-down the Texas educational system.

(C.R. 112.) Petitioners had full knowledge of what allegations were necessary to plead a claim that the local ad valorem tax had become a statewide property tax. But they ignored that standard because they could not meet it.

The district court correctly understood from the hearing that Petitioners wished to stand on their pleadings. (R.R. 45-51, 93, 97-98.) Further, the district court determined that Petitioners could not amend to state a claim.

The appellate court agreed. As the appellate court observed, "[t]he enriched education that West Orange-Cove locally desires to provide its students is not the measure for determining if the Sate is imposing an educational mandate that requires the local district to levy a state imposed rate of tax." *West Orange-Cove*, 78 S.W.3d at 539; Tab A.

If a plaintiff elects to stand on his pleadings, or if a plaintiff is unable to allege facts that will state a cause of action, it is permissible for a court to dismiss on special exceptions without allowing amendment. *See Townsend v. Mem'l Med. Ctr.*, 529 S.W.2d 264, 267 (Tex. App. Corpus Christi 1975, writ ref'd n.r.e.) (citing *Rutledge v. Valley Evening Monitor*, 289 S.W.2d 952, 953 (Tex. App. San Antonio 1956, no writ)); *Zaremba v. Cliburn,* 949 S.W.2d 822, 829 (Tex. App. Fort Worth 1997, writ denied); and *Sepulveda v. Krishnan, M.D.*, 839 S.W.2d 132, 134 (Tex. App. Corpus Christi 1992), *aff'd on other grounds*, 916 S.W.2d 478 (Tex. 1995).

2. The Court of Appeals did not impose a new pleading standard on Petitioners.

Petitioners cannot support their claim that the appellate court imposed a new pleading standard that they did not have an opportunity to meet. As indicated above, the parties pled that, to state a claim, Petitioners had to allege that they were forced to tax at the cap to provide an accredited education. The district court understood that the test set out in this Court's changed-circumstances warning for a loss of meaningful discretion in setting a tax rate required that the ceiling become a floor because of the requirements mandated by the State. "[T]he constitutional question is not how many districts *are* at the cap, but how many districts *must be* at the cap to provide an accredited education." Tab B at 23. Likewise, the appellate court recognized that "the allegation that a district is forced to tax at the highest allowable rate to provide the bare, accredited education is a necessary element of a cause of

action brought by a district challenging the cap." *West Orange-Cove*, 78 S.W.3d at 539; Tab A.

Petitioners attempt to convince this Court that they were denied their day in court because the district court interpreted the constitutional question of a state ad valorem tax to require a showing of a statewide problem, and the appellate court affirmed dismissal on the simpler ground that Petitioners did not even adequately plead that *they* had lost meaningful discretion in setting *their* tax rates. The district court incorporated the same requirement that the appellate court imposed, that Petitioners plead that they are forced to tax at the cap to provide an accredited education, but, in its analysis, the district court went past Petitioners' pleading deficiency. The district court reasoned that for a plaintiff to be able to claim that the force of the $1.50 cap and the necessity of meeting the accredited standard deprived school districts of meaningful discretion in setting their tax rate, creating a state ad valorem tax, it was necessary for a district to show a *statewide* problem by pleading that a significant number of districts were at the cap.[12] The district court found that Petitioners had not done this and could not do this because 88% of the school districts in the State did not have to be at the cap and were providing an education that was accredited or better.

The district court was not required on special exceptions to assume that districts at the cap *must* be at the cap. A district court is only obliged on special exceptions or a plea to the

[12] The appellate court, noting this Court's comment in *Edgewood IV* that the system encouraged school districts to tax at or near the maximum rate, found this pleading requirement irrelevant for purposes of determining whether the system imposed a state tax, unless the districts are forced to tax at the maximum to fulfill a state mandate an accredited education. *Id.*

jurisdiction to accept as true all material factual allegations and all reasonable inferences from the allegations in the pleadings. *City of Austin v. H.L. & P. Co.*, 844 S.W.2d 773, 783 (Tex. App. Dallas 1996, writ denied); *Fireman's Ins. Co. v. Bd. of Regents,* 909 S.W.2d 540, 542 (Tex. App. Austin 1995, writ denied). Petitioners did not plead that they *must* be at the cap to provide an accredited education. Without such an allegation the district court did not have to make the assumption it made. It seems that the district court was attempting to set a pleading threshold that gave the margin of error to the Petitioners. Tab. B at 23. However, this assumption does not create the claimed disharmony between the district court's findings and the appellate court's determination.[13] In the absence of a proper allegation, the assumption was irrelevant to the court of appeals' holding.

3. Even if Petitioners were incorrectly denied the right to replead in the face of special exceptions, their lawsuit was correctly dismissed on the State's Plea to the Jurisdiction.

Petitioners' lawsuit was dismissed not only on special exceptions but also on the State's plea to the jurisdiction because Petitioners did not state a ripe claim. Assuming that Petitioners could not present a claim that was ripe based on present conditions because of the undisputed facts presented on the plea, the district court further determined that Petitioners

[13] Petitioners claim that they were denied discovery. Petitioners filed their suit on April 9, 2001. The hearing on special exceptions and the plea to the jurisdiction was held on June 28, 2001. Petitioners did not make any discovery requests during that time period, nor did they propose a scheduling order under Level 3 of Rule 190.4 of the Texas Rules of Civil Procedure. Petitioners certainly possessed knowledge of their own tax rates, budgets, accreditation level, and of the discretionary actions taken by their official. Respondents attached statewide tax rate information to their Plea to the Jurisdiction filed on May 7, 2001. It is not clear what discovery Petitioners needed to make the necessary allegation.

could not state a ripe claim that a sufficient number of districts would soon be at the cap under the "likely to occur" prong of a ripeness analysis because: (1) the court owes deference to the Legislature's determination that taxes up to $1.50 are adequate to fund an accredited education; (2) the Legislature can fix a problem that is "likely to occur;" and (3) the presumption that co-equal branches of government will do their duty is strong. Tab B at 26. The appellate court affirmed the dismissal for lack of jurisdiction, holding that "the claim [was] unripe because the appellants . . . failed to demonstrate that they [were] forced to set their rates of tax at the maximum allowable rate just to provide an accredited education." *West Orange-Cove*, 78 S.W.3d at 542; Tab A. Petitioners failed to make this allegation because the facts do not support it.

Petitioners' claims are at best anticipatory and depend on the occurrence of contingent future events that may not occur as anticipated, or at all, and were properly dismissed. *Patterson v. Planned Parenthood of Houston and Southeast Tx., Inc.*, 971 S.W.2d 439, 444 (Tex. 1998). If a court does not dismiss an unripe claim, it is engaging in the impermissible practice of rendering advisory opinions. *Id.* at 442.

In their Brief on the Merits, Petitioners cite several times to TASA/TASB SPECIAL COMMITTEE ON REVENUE AND SCHOOL FUNDING, A REPORT CARD ON TEXAS EDUCATION to bolster their claim that the school finance system is "perilously close" to collapse. This report is intended to persuade legislators to put more money into the system and is projecting that by the Fall of 2003, 400 districts will be taxing at the $1.50 cap. The

report does not analyze why districts are at the cap or how they are spending their money. To reach its dire conclusion, it projects consequences in 2005 and beyond on the assumption that the Legislature will do nothing in the ensuing sessions. Though this is good material to lobby the Legislature, it does not support a constitutionally ripe case now.

Whether one looks at the big statewide picture, as did the district court, or focuses on the simple but necessary allegation required by the appellate court, Petitioners did not and cannot plead a viable claim. They thus are left arguing that they should be given the opportunity to conduct discovery and litigation on the unpled issue whether an accredited education provides a general diffusion of knowledge. But this Court has already recognized that this is a policy question for the Legislature, and not the courts, to decide: "[D]istricts must have substantially equal access to funding up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge. Under the system established by the Legislature in Senate Bill 7, this means that each district must have substantially equal access to the funds necessary to provide an accredited education." *Edgewood IV,* 917 S.W.2d at 730 & n. 9. Petitioners did not and cannot plead that they are forced to tax at the cap in order to provide an accredited education.[14] No amount of repleading (or even discovery) would change that. The district court and court of appeals

[14] Petitioners, as property-wealthy districts, enjoy a tax-yield advantage of approximately $3.36 per weighted student over property poor-districts for each penny of their tax rate over eighty-six cents. Some school districts have an even greater advantage because of the hold-harmless provision, § 41.002(e) of the Texas Education Code. If a property-wealthy plaintiff proves that a tax of $1.50 is not adequate to meet the general diffusion of knowledge standard, the dominant constitutional question will be efficiency (equity), not whether the tax has become a state ad valorem tax.

correctly held that, under such circumstances, dismissal was proper.

C. Respondents' Reply to Petitioners' Issue 2:

1. It was reasonable for the district court to assume that the system for public school finance could not violate article VIII, section 1-e of the Texas Constitution unless the $1.50 cap had created a statewide problem, and the bright line pleading test set by the district court to determine if the petitioners could go forward to challenge the constitutionality of provisions of the Education Code already approved by this court was reasonable.

Petitioners pled a statewide problem: "the statutory cap on the M&O tax rate has become a statewide ad valorem tax. . . ." (C.R. 109.) They sought relief which would have affected the entire system: "[Petitioners] request that the Court enter a judgment declaring that the $1.50 statutory cap on M&O tax rates constitutes an unconstitutional *statewide* ad valorem tax . . . [and] request that the State assume a greater responsibility for financing the school system and end its overreliance on the local property tax." (Emphasis added.) (C.R. 000109.)

The district court reasoned that a challenge to the $1.50 cap on M&O tax rates based on the cap depriving districts of meaningful discretion in setting their tax rate had to be premised on a statewide problem, not just a problem in the few districts bringing suit.[15]

> Whether the Legislature has imposed a state ad valorem tax is decided by reference to how the public school finance system works throughout the state, not by reference to how the system works in any one district. Moreover, to look at the question district by district would mean that the tax could be constitutional in one district and unconstitutional in another.

[15] An individual district, or several districts, asserting that their local ad valorem tax had become a state ad valorem tax because they were forced to tax at $1.50 to provide an accredited education would have a difficult problem of proof if a thousand or more districts were providing an accredited education within the $1.50 cap.

Tab B at 22-23.

With that beginning point, the district court explained that "the present case . . . turns on how the court defines 'meaningful discretion' and whether the [Petitioners] have pleaded or can plead a lack of 'meaningful discretion' within that definition." (C.R. 240.) "[T]he constitutional question is not how many districts *are* at the cap, but how many districts *must be* at the cap to provide an accredited education." (C.R. 244.) In the face of a ripeness challenge, the district court found that Petitioners "must be able to plead that some significant number of districts *are* at the cap to go forward with a claim that too many districts *must be* at the cap." (C.R. 244.) The district court held that "[f]or the legislative design to be an unconstitutional *state* ad valorem tax, the design must require a [constitutionally] significant number of districts to tax at the cap, something approaching or exceeding half the districts." (C.R. 245.) The court believed that a trial on the merits would involve whether the districts *at* the cap *have to be at* the cap to provide an accredited education. That inquiry would determine whether the districts are forced to be at the cap and, therefore, whether the system has created a state ad valorem tax. The district court concluded that its pleading threshold would insure that the court did not intrude prematurely into matters reserved for other branches of government.

Unable to meet this pleading threshold, Petitioners now ask this Court to set it aside; they ask this Court to consider districts taxing at $1.45 and above as districts for which the $1.50 cap has become a floor as well as a ceiling. Additionally, they ask this Court to ignore an obvious exercise of discretion and include districts who have given optional exemptions

within the group alleged to have lost all discretion in setting their tax rate.

The Court should reject Petitioners' position. Even under their favorable standard, Petitioners can only allege that 37% of the State's public school districts tax at or within five cents of the $1.50 cap.[16] If Petitioners' conception of ripeness is correct, the logical conclusion is that their claims actually ripened when the Supreme Court held that "some" districts would inevitably reach the $1.50 mark, because, under their expansive reading of ripeness, the injury was imminent and apparent at that time.

The Petitioners argue that the 50% threshold set by the district court is too high. They assert that they "should not be forced to wait until half of the school districts lose all discretion in setting tax rates before they can raise a constitutional claim." Petitioners' Br. at 32.

This is, of course, not the threshold set by the court. The court only required that around 50% of the districts be *at* the cap, regardless of whether they *have to be* there. The district court recognized that being at the cap is not the same as needing to be at the cap to provide an accredited education. As the *Edgewood IV* Court recognized, property-poor districts might exercise discretion to be at the cap to maximize their state aid.[17] *Edgewood IV*, 917 S.W.2d at 738. Additionally, many districts may be at the cap and still be exercising a great deal of

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[16] If the Court takes judicial notice of tax information from 2001-02 offered by the Petitioners, they still can only allege that 41% of the school districts are now taxing at or within five cents of the $1.50 cap. In real numbers, this is the difference between 386 districts and 430.

[17] Of the 196 school districts taxing at $1.50 for 2000 tax year, only 17 were Chapter 41 districts. Chapter 41 districts are property-rich districts. Of the 386 districts taxing above $1.45 for the same period, 193 were Chapter 41 districts. (C.R. 25-55.)

discretion to fund activities and programs not required for an accredited education.[18] The district court noted that the Petitioner districts had taken 20% of their residential tax base off the table by granting an optional homestead exemption in addition to the required homestead exemption.[19] (C.R. 208-209.)

2. Language in the *Edgewood IV* decision supports the district court's determination that Petitioners' challenge requires a showing of a statewide problem and does not weaken the standard for ripeness.

In *Edgewood IV*, this Court found the $1.50 cap on M&O taxes constitutional. The Court applied the test that it had set out in *Edgewood III*:

> An ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion.

Edgewood IV, 917 S.W.2d at 737. It found that, while a desire to maximize state aid might encourage a property-poor district to maximize its rate, and while a desire to maintain previous levels of revenue might encourage a property-rich district to tax at the maximum allowable rate, the State in no way requires a district to do either. *Id.* at 738.

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[18] At the hearing, Plaintiffs' attorneys predicted that their schools might have to cut extra-curricular activities. (. R. 96.) The Eanes district recently spent $6 million for a state-of-the-art football stadium with a $400,000 Jumbotron scoreboard with video screen. Donna Howard, *We Can't Afford Mediocrity in Schools*, AUSTIN AM. STATESMAN, Nov. 1, 2002, at A17. This pales in the face of the $47 million dollar sports complex built for the Midland school district. *Area Football Previews*, DALLAS MORNING NEWS, Aug. 31, 2002, at 6Y.

[19] Section 11.13(n) of the Tax Code allows a school district to grant, by vote of the governing body, a residence homestead exemption of up to 20% to its taxpayers. This homestead exemption is a voluntary act of the school trustees and is in addition to the residence homestead exemption provided by § 11.13(b) of the Tax Code. (C.R. 58.)

Petitioners believe that the Court's cautionary language that follows this holding opens the door for this litigation.[20] This language suggests that the system *could* become unconstitutional if the cost of providing an accredited education were to increase to the point that the system in effect required all districts to tax at the $1.50 rate:

> [I]f the cost of providing for a general diffusion of knowledge continues to rise, as it surely will, the minimum rate at which a district must tax will also rise. Eventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge. If a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a statewide ad valorem tax would appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate.

Id.

Petitioners argue that the Court's use of the word "some" in this paragraph "indicates that the threshold lies between some *de minimis* level and 50%" because if the Court meant "half," "most," or "a majority" it would not have deliberately chosen the word "some." Petitioners' Br. at 33. It is well-recognized that in explaining the reasoning and context of its holding a court may range over much territory, but only the portion of the opinion necessary to the question presented and decided is authority; the rest is *obiter dicta. United N. & S. Oil Co. v. Meredith,* 258 S.W. 550, 556 (Tex. Civ. App. Austin 1924), aff'd, 272 S.W. 124 (Tex. Comm'n. App. 1925, judgm't adopted); *Field v. Munster,* 32 S.W. 417, 418 (Tex. Civ. App. 1895, writ denied); *Stephens County v. Mid-Kansas Oil & Gas Co.,* 254 S.W. 290, 294 (Tex. 1923). This paragraph cannot be read as Petitioners would read it. Such an indefinite word

[20] Respondents do not concede this.

as "some" simply cannot be required to bear so much weight.[21]

The better reading of the paragraph is that in the sentence "Eventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge" the Court carefully uses the indefinite word *some* to avoid suggesting a numerical threshold for the substantive constitutional question. The important sentence in the paragraph is: "If a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a *statewide* ad valorem tax would appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate." *Edgewood IV*, 917 S.W.2d at 738 (emphasis added.) In this sentence, the introductory "if" clause describes a situation that has progressed past *some* districts having to tax at $1.50 to the situation where enough districts are forced to be at the cap to justify calling the result a *statewide* ad valorem tax.

The paragraph that follows this paragraph, and distinguishes the current system from the system found to impose a state ad valorem tax in *Edgewood III,* supports the conclusion that the Court was not thinking that the current system would offend the constitution if *some* districts were taxing at the cap. That paragraph begins: "Taken together, these restrictions [the $0.86 tax required to participate in the Foundation School Program and the $1.50 cap] do not at this time approach the level of control exercised in Senate Bill 351, which set

[21] Of course, the *Edgewood IV* Court was not deciding on a pleading threshold for "ripeness" but rather describing a scenario that might play out eventually.

uniform tax rates and prescribed the distribution of *all* tax proceeds." *Edgewood IV*, 917 S.W.2d at 738 (emphasis added). Earlier in the *Edgewood IV* opinion, when the Court discusses the $1.50 cap in relation to local supplementation, it is clearly referring to an effect on the entire system, cautioning that "the amount of 'supplementation' in the system cannot become so great that it, in effect, destroys the efficiency of the entire system." *Id.* at 732.

Finally, Justice Enoch, in his dissent, certainly wrote as if the majority conceived of article VIII, § 1-e as prohibiting a *statewide* ad valorem tax. *Id.* at 756 n.15. Additionally, Justice Enoch saw the evidence at trial as projecting that *all* districts would be taxing at $1.50 by 1996-97. Yet, even so, the majority approved the system. *Id.* at 755 n.11, 756. Justice Hecht and Justice Owen in their concurrence and dissent also perceived the conversation within the Court to involve "*every* school district in Texas . . . mov[ing] as quickly as possible to the maximum $1.50 rate. . . . The local ad valorem tax rate in *every* school district would hardly be more certain if the Legislature simply prescribed it. . . ." *Id.* at 765 (emphasis added).

Petitioners brought suit intending to affect the entire public school finance system, and they should be required to plead that at least a constitutionally significant number of districts within that system are at the cap to trigger a district court's jurisdiction. The district court carefully reviewed the guiding rules and principles from the *Edgewood* litigation, other relevant law, and the pleadings of the parties to determine that Petitioners had to plead that a significant number of districts are required to tax at the cap "something approaching or

exceeding half the districts." Tab B at 24. This Court should uphold the district court's exercise of discretion in setting this threshold. As the district court noted, "using the cap as a bright line means that a claim will go forward at the earliest possible point that it is at least plausible that the floor has become a ceiling across a significant portion of the state." Tab B at 23.

3. On the face of their pleadings, Petitioners failed to plead a case or controversy under the Texas Constitution that is ripe for adjudication, and the district court correctly dismissed their petition.

a. Ripeness requires an actual injury or an injury that is so likely to occur that it is not conjectural, hypothetical, or remote.

Ripeness demands that a case present actual injury or a set of facts that demonstrate that actual injury is so likely to occur that the court is not being asked to decide issues that depend on contingent or hypothetical facts, or upon events that have not yet come to pass. *Patterson*, 971 S.W.2d at 443. If the threat of injury to a plaintiff is not "'direct and immediate' rather than conjectural, hypothetical, or remote," the court does not have jurisdiction to hear the case. *Waco I.S.D. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000). When claims are anticipatory and depend on the occurrence of contingent future events that may not occur as anticipated or may never occur, a court cannot resolve them, but must instead dismiss the case. *Patterson*, 971 S.W.2d at 444. To do otherwise would be to engage in the impermissible practice of rendering advisory opinions, in violation of the separation of powers doctrine. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

Petitioners argue to expand the "likely to occur" prong of the ripeness analysis to encompass the hypothetical, contingent facts behind their claims by citing this Courts' opinion in *Perry v. Del Rio,* 66 S.W.3d 239 (Tex. 2001). Rather than approving an expansive use of the "likely to occur" prong of ripeness, the *Del Rio* Court was strict in its application, refusing to find that the dispute had matured to a point that warranted decision until the Legislature adjourned *sine die*. *Id*. at 255 (Tex. 2001).

Petitioners next embrace the "ripening seeds of a controversy" language that appears in *Texas Department of Banking v. Mount Olivet Cemetery Association*., 27 S.W.3d 276, 282 (Tex. App. Austin 2000, pet. denied), believing that it suggests that a lower standard of factual development is necessary for ripeness in declaratory judgment actions. Yet it is clear that in the cases that use this standard the facts present injury that is imminent and unavoidable. In *Mount Olivet,* when suit was brought, the Banking Department had already cited Mount Olivet for violation of a statute, had refused to negotiate any short-term settlement of the funds at issue, and had referred the matter to the Comptroller for enforcement action. In *Peacock v. Shroeder,* 846 S.W.2d 905, 912 (Tex. App. San Antonio 1993, no writ), a counterclaim would not lie under the "ripening seeds" analysis because voluntary removal of equipment from a lease mooted the claim, and the fact that the equipment might "someday" be returned, requiring another suit, did not create a ripe controversy.

In an earlier case, the Fort Worth Court of Appeals explains that "by 'ripening seeds' is meant a state of facts indicating imminent and inevitable litigation." *Gray v. Bush,* 430

S.W.2d 258, 263 (Tex. Civ. App. Fort Worth 1968, writ ref'd n.r.e.). "It would be only when the claims of adversaries have reached such state and the controversy is such as renders it distinct from one of hypothetical or abstract character that it would be treated as a justiciable controversy requiring present decision of the court." *Id.* (citing Anderson, Declaratory Judgments, p. 27, 'Justiciable Controversies, Etc.', § 8.)

Finally, this Court has been consistent and clear that "hypothetical, 'iffy' and contingent" facts do not confer jurisdiction on Texas courts. *Fireman's Ins. Co. v. Burch,* 442 S.W.2d 331, 333 (Tex. 1968) (citing a line of cases beginning with *Morrow v. Corbin,* 62 S.W.2d 641 (Tex. 1933)). "[T]he Declaratory Judgment Act gives the court no power to pass upon hypothetical or contingent situations, or determine questions not then essential to the decision of an actual controversy, although such question may in the future require adjudication." *Id.* "A case is not ripe when its resolution depends on contingent or hypothetical facts, or upon events that have not yet come to pass." *Patterson*, 971 S.W.2d at 443 (citing *Camarena v. Tex. Employment Comm'n,* 754 S.W.2d 149, 151 (Tex. 1988)). In the *Del Rio* case, despite the external deadlines affecting the redistricting question, the Court applied a stringent standard in deciding that the claims did not become ripe until all possibility of enactment of a plan during the regular session of the legislature had passed. 66 S.W.3d at 255.

b. Petitioners did not plead actual injury nor did they plead an injury that was likely to occur.

The district court recognized that, if the changed circumstances warning of *Edgewood*

IV opened the door to a constitutional challenge that the $1.50 cap had changed from a constitutionally approved element of the system to a constitutionally prohibited state ad valorem tax, there were two elements that must come into play. First, a constitutionally significant number of districts had to be taxing at $1.50. Second, they would have had to have exhausted their discretion to provide for a general diffusion of knowledge (an accredited education under the law of the case)[22] at anything less than a $1.50 tax rate. The court determined that the first element was a pleading threshold to state a ripe claim.

When a court dismisses a case on special exceptions or a plea to the jurisdiction, the appellate court "accept[s] as true all material factual allegations and all factual statements reasonably inferred from the allegations set forth" in the plaintiff's pleadings. *Sorokolit v. Rhodes*, 889 S.W.2d 239 (Tex. 1994). Applying this standard generously, the material factual allegations in Petitioners' pleadings are:

> In the six years since the 1995 *Edgewood IV* decision, education costs have continued to rise. (C.R. 109.)
>
> Petitioners, Chapter 41 school districts, have continued to increase their M&O tax rates to the point that they are presently at the $1.50 statutory cap or will be at that cap in the next budget year. (C.R.107.)
>
> School districts, such as the Petitioners, are required to tax at or near the maximum allowable $1.50 M&O tax rate in order to educate students in their districts. (C.R. 109.)
>
> Without relief from the statutory cap on M&O tax rates, the Petitioners' school districts must continue to take such measures as cutting programs, eliminating teaching positions and/or increasing class size. (C. R. 109.)

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[22] *Edgewood IV*, 917 S.W.2d at 731 n.10.

Petitioners' allegations do not show actual injury or a set of facts that suggest that actual injury is imminent. The district court correctly dismissed this case because the Petitioners' own allegations established that there exists no ripe, justiciable case or controversy on which they could base a claim that gives rise to jurisdiction.

Petitioners did not allege that the system currently requires *a significant number of* school districts to tax at the $1.50 rate. Allegations of tax rates near $1.50 in *some* districts does not show ripeness. There are several reasons why Petitioners did not and cannot allege that they must tax at $1.50 to provide an accredited education. For example, each of the Petitioner districts has voluntarily elected to grant an optional 20% homestead exemption. Having chosen not to collect on 20% of their available revenue from homestead property, they cannot plead or prove that the state system *forces* them to tax at $1.50 just to provide an accredited education. Because hundreds of districts across the state *are* providing accredited educations at rates less than $1.50 while granting a 20% homestead exemption Petitioners do not allege that they must tax at that rate to provide an accredited education because they cannot prove such an allegation. The district court correctly determined that Petitioners failed to allege, *and could not allege,* facts that created a ripe controversy.

Petitioners are wrong in asserting that the district court ignored the "likely injury" prong of the ripeness analysis. The court analyzed it at length in section II of its opinion. Tab B at 25-29. However, given Petitioners' pleadings, it is irrelevant whether the district court examined ripeness only under the "actual injury" prong and ignored the "likely to occur"

prong of the ripeness inquiry, because Petitioners' pleadings fail under either test. Similar to the Petitioners in *Gibson,* "with every available opportunity to generate record evidence opposing [the jurisdictional challenge, the Petitioners] . . . could not have done so because the evidence required to do so did not exist. Indeed, that is exactly why the claim is not ripe." *Gibson*, 22 S.W.3d at 852. Petitioners insist, though, that the pleading threshold set by the court is too high and would have this Court find that ripeness in this particular case requires only that "some" school districts have reached the $1.50 cap and have lost all meaningful discretion in setting tax rates. They argue that "the fact that 17% of districts are now taxing at $1.50 without an optional homestead exemption is sufficient to demonstrate an 'actual injury.'" Petitioners' Br. at 37.

The district court correctly found the number of districts taxing between $1.45 and $1.49 irrelevant to determining a threshold number for pleading that circumstances had changed enough from *Edgewood IV* to create a justiciable controversy. The court looked to $1.50 to establish a bright-line test.

> The court needs a bright line to serve as a pleading threshold to know when treading so close to the separation of powers is justified. Without this bright-line, the districts will regularly involve the court in legislative disputes by using the court to conduct a 'meaningful discretion' review after every session of the Legislature.

Tab B at 22.

Petitioners characterize the prediction in *Edgewood IV* as warning of an "inexorable march to $1.50" and equate it with the "likely to occur" prong of the ripeness test.

This correlation works against them but supports the district court's determination that "the court has no jurisdiction to issue an advisory opinion to the Legislature premised upon a finding that in the future, the Legislature will not do what it is constitutionally required to do." Tab B at 26. One need only ask why the prediction in 1995 by Justices Enoch, Hecht, and Owen that all school districts would immediately, or as quickly as other laws allowed, tax at $1.50 did not come true to understand the soundness of the district court's determination that Petitioners' "likely to occur" argument cannot confer jurisdiction.

In every legislative session since 1995, the legislature has made adjustments to the system that have affected the amount of tax money that can be raised within the $1.50 cap, and has kept the system in balance. *See Supra* at 11. (C.R. 248-249.) House Bill 3343 became effective on September 1, 2001, and changed the equalized wealth level from $295,000 to $300,000 beginning September 1, 2001, and to $305,000 beginning September 1, 2002. Act of May 28, 2001, 77th Leg., R.S., H.B.3343, § 2.02(a) (codified as an amendment to TEX. EDUC. CODE § 41.002). This change directly affects the tax base that districts have access to and will influence their need to tax at higher rates. In the first year, Coppell gained access to 774,472 additional dollars and, in the second year, the gain increased to $1,619,146; La Porte gained access to 639,852 additional dollars and, in the second year, the gain increased to $1,281,194; Port Neches-Groves gained access to 435,258 additional dollars and, in the second year, the gain increased to $892,580; and West Orange-Cove gained access to 346,014 additional dollars and, in the second year, the gain increased to $693,463.

Statewide, the gain to districts was about $338 million in the first year and $770 million in the second year.

The wisdom of refraining from adjudicating complex policy issues until the facts have fully matured is illustrated by the fate of another warning in the *Edgewood IV* opinion referring to the lack of separate funding for facilities in the approved system:

> [i]f the cost of providing a general diffusion of knowledge rises to the point that a district cannot meet its operations and facilities needs within the equalized program, the State will, at that time, have abdicated its constitutional duty to provide an efficient system. . . . From the evidence it appears that this point is near.

Edgewood IV, 917 S.W.2d at 747. The point that appeared very near in 1995 did not come because, later in 1995, the Legislature authorized a $170 million Facilities Assistance Grant program which provided aid to 276 districts through a formula based on size and wealth and supported the construction of approximately $250 million in facilities. In 1997, the Legislature authorized $200 million for a guaranteed-yield program known as the Instructional Facilities Allotment (IFA). This program provided guaranteed state aid for debt service over a period of eight years or more based on a formula which considers property wealth per student, the issuance of eligible debt and tax effort. State aid is provided in the form of yearly support to help districts pay long-term debt service costs rather than one-time cash awards. In 1999, the IFA was continued and guaranteed districts $35 per ADA per penny of tax effort for new instructional facility debt obligation. In 1999, the legislature also created the Existing Debt Allotment (EDA) guaranteeing $35 per penny per ADA for up to $0.12 of tax

effort (more if funding is available) for old debt. The 77th Legislature raised the guarantee to $0.29 of tax effort and broadened the definition of eligible bonds. In 2002-2003 debt service support from the state will exceed $760 million.

At the hearing on special exceptions and the plea to the jurisdiction, Petitioners urged their "likely to occur" argument, in part, based on their failure to get the last Legislature to address the issues that Petitioners believe must be addressed. ® R. 52.) This Court has most recently indicated the necessity of giving the Legislature every chance to act before concluding that an issue is ripe for judicial intervention.

> While the ripeness of a claim for judicial redistricting requires a showing of legislative inaction, the difficulties with such a showing are formidable. First, no one can speak with authority about what the Legislature will and will not do. . . . Second, predictions about the probable course of the legislative process are notoriously unreliable. . . . Third, courts should not encourage parties to predict, much less prove the improbability of, legislative inaction on the important matter of redistricting. Every encouragement, at least from the judiciary, should be toward adoption of a legislative solution.

Del Rio, 66 S.W.3d at 255. There is no deadline for the Legislature in the school finance area, but the importance of the development of facts to maturity and the time to exercise its policy-making role before judicial intervention is as important in this area, which involves 1035 taxing units, $30 billion, responsibilities to balance equity for property-poor districts with taxpayer concerns, and policy issues that are among the closest to the citizens of any faced by the Legislature.

As the district court appreciated, the "likely to occur" prong of the ripeness analysis is dangerous territory, particularly if weakened in the way Petitioners urge. Any number of events might occur to affect how many districts will be taxing at the cap after the next legislative session. For example, the cap could be raised; districts could lower tax rates in response to taxpayer demands to tighten belts; districts with untenable financial situations could voluntarily consolidate; districts could eliminate waste; wealthy districts could begin using options to equalize wealth which do not require that they pay money to the State; the Legislature could consolidate districts; the Legislature could eliminate some property tax exemptions;[23] or the legislature could fund education from a tax source other than the property tax; the voters could approve a state ad valorem tax.[24]

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[23] Petitioners cite to the TASA/TASB, Report on School District Mandates on page 17 of their brief to suggest that their discretion to set a tax rate is impinged by state mandates. This report also notes that an increase in property tax exemptions through such mechanisms as abatement zones, tax increment financing and agricultural exemptions the state inhibits the ability of school districts to raise revenue. It also criticizes the guaranteed yield aspects of the funding system for rewarding districts for raising taxes. TEXAS ASSOC. OF SCHOOL ADMIN./TEXAS ASSOC. OF SCHOOL BDS, REPORT ON SCHOOL DISTRICT MANDATES, 1-20 (Sept. 2002), *available at* http://www.tasanet.org/depserv/govrelations/mandates02.pdf.

[24] In their brief, Petitioners quote a study done by Moak, Casey & Associates, LLP for the Joint Interim Select Committee on School Finance which shows that school districts in the state are utilizing 97.7% of the revenue capacity available to them. This same study suggests to the legislature many complicated issues to consider in fixing the system including full state financing of retirement benefits; flexibility in textbook funding; an equity adjustment to eliminate the funding gap between property-rich and property-poor districts; considerable changes in the current funding weights attached to students with special needs; changes to the allocations given to different districts based on their special needs; creation of a single tier system; a revamp of the facilities funding; and use of actual local property values excluding optional exemptions and actual tax rates minus optional exemptions in the funding formulas. All of these issues are appropriate for the legislative process. The bottom line in Mr. Moak's testimony is that, even if all efficiencies are explored. the current system cannot be fixed without substantial new revenues which is certainly an issue best left to the legislature. Testimony of Lynn Moak, *Joint Select Committee on Public School Finance,* 77th Le., Interim (Feb 7, 2002). Available at http://www.senate.state.tx.us/75r/senate/commit/c890/c890.htm#Reports, under Feb. 7, 2001 hyperlink.

At the hearing on the plea and special exceptions, Petitioners' attorney told the court:

> [W]e went to the Legislature and we said, why don't you put public education on the agenda for this legislative session? You've got a surplus. You know there's a problem. [I]t's happening now. It's going to happen even more by the time of 2004. . . . We bet (sic) them, they said, No. You know what they offered us? [A]n interim committee.

(R.R. 52.) Later in the hearing, Petitioners' attorney referred to this lawsuit as an "alternative" that they wanted in case the Legislature did not carry out its duties in good faith. (R.R. 97.) In fact, they do not even ask the court for injunctive relief. When they amended their petition they added, "the constitutional deficiency cannot be cured simply by raising the statutory cap, because such a solution would only aggravate the State's over reliance on local property taxes." (C.R. 110.) As the district court noted, Petitioners' pleadings and their statements to the court reveal that theirs is the classic request for an advisory opinion. (C.R. 249.) Judicial declarations should not be available as leverage in legislative policy debates unless and until the jurisdictional prerequisites for jurisdiction are present.

4. The Petitioners fail to understand "ripeness" as part of the separation of powers doctrine and, therefore, fail to appreciate the importance of the Court's deference to the legislature in the school finance issues raised by this litigation.

The constitutional roots of ripeness lie in the prohibition against advisory opinions, which in turn stems from the separation-of-powers doctrine. *Patterson,* 971 S.W.2d at 442. This Court clearly explained in *Patterson* that district courts do not give advice or decide cases based on future contingent events or hypothetical, speculative situations, because to do so intrudes on the roles of the other branches of government. In the recent redistricting case,

Del Rio, the Court reaffirmed the teachings of *Patterson,* noting that the "[r]ipeness doctrine is invoked to determine whether a dispute has yet matured to a point that warrants decision." *Del Rio*, 66 S.W.3d at 249 (citing 13A CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 3532, at 114 (2d ed. 1984)).

When litigation involves duties assigned in the first instance to other branches of government, the separation of powers concern is heightened because it flows both against the judiciary assuming functions beyond its powers and towards deferring to the other branch of government until it is clear that it has failed to carry out the required duty. *See Del Rio*, 66 S.W.3d at 254-56. Courts must not intrude into "highly charged political enterprise[s] . . . except as a last resort." *Id.* at 254.

Petitioners assign error to the district court for creating a "legislative exception" to the ripeness standard. Petitioners' Br. at 41. However, because deference to separation of powers is at the heart of "ripeness," a court is required to defer to the legislature as long as possible. This is certainly the teaching of *Del Rio.* "Perhaps, the most costly price of advisory opinions is the weakening of legislative and popular responsibility [because] it is not merely the right of the legislature to legislate; it is its duty." Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1007 (1924).

A functional approach to the ripeness doctrine requires a court, under the facts of this case, to avoid adjudicating whether a constitutional tax has become a constitutionally prohibited tax until it is clear that the claims are not anticipatory nor dependent on the occurrence of contingent future events that may not occur as anticipated or may never occur.

As this Court has stated, "[t]here is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds." *Texas Nat'l Guard Armory Bd. v. McCraw*, 126 S.W.2d 627, 634 (Tex. 1939). Furthermore, tax legislation receives special deference. "There is always a presumption of constitutional validity [with regard to legislation] and it is especially strong in respect to statutes relating to taxation." *Vinson v. Burgess,* 773 S.W.2d 263, 266 (Tex. 1989); *Whitworth v. Bynum,* 699 S.W.2d 194, 197 (Tex. 1985).[25] The *Edgewood* Court itself recognized that its "role under our Constitution's separation of powers provision should be one of restraint. We do not dictate to the Legislature how to discharge its duty." *Edgewood IV*, 917 S.W.2d at 725.

VII.

CONCLUSION

For these reasons, the petition for review should be denied.

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[25] The deference a court gives to the Legislature under a ripeness analysis is a corollary of the principles applied in reviewing the merits of a claim that an act of the Legislature is unconstitutional. An act of the Legislature is presumed to be constitutional, and a party opposing a statute has the burden to show that it is unconstitutional. *Tex. Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924, 927 (Tex. 1985). A plaintiff challenging the constitutionality of a statute has the burden of overcoming this strong presumption and proving his case. *Pogue v.Duncan,* 770 S.W.2d 867, 872 (Tex. App. Tyler 1989, writ denied). Unless the invalidity of a statute is apparent beyond a reasonable doubt, its constitutionality must be upheld. *State v. City of Austin,* 331 S.W.2d 737, 747 (Tex. 1960); *Trapp v. Shell Oil Co.,* 198 S.W.2d 424 (Tex. 1946). Thus, in order to prevail, Plaintiff must negate every conceivable rational basis for the statute. *City of Humble v. Metro. Transit Auth.,* 636 S.W.2d 484, 488 (Tex. Civ. App. Austin 1982, writ ref'd n.r.e.).

Respectfully submitted,

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